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# FALLING THROUGH THE GAP: THE CULPABILITY OF CHILD SOLDIERS UNDER INTERNATIONAL CRIMINAL LAW

*Ally McQueen\**

## INTRODUCTION

When asked to picture the “poster child” victim of contemporary armed conflict, many think of just that: a child. In the last decade alone, armed conflicts have “killed two million children, disabled four to five million children and left twelve million children homeless.”<sup>1</sup> Given those statistics, it is difficult to imagine that children could play any role in an armed conflict apart from that of the victim. In reality, however, child soldiers<sup>2</sup> are responsible for some of the most horrific atrocities in modern warfare, including grave violations of international criminal law.

“[C]hild soldiering today is a widespread phenomenon, . . . particularly in developing countries where political, economic, and social instability are more commonplace.”<sup>3</sup> An estimated 300,000 child soldiers, some as young as seven years old, are currently serving both state and nonstate forces in more than thirty international and internal conflicts around the world.<sup>4</sup> Though child soldiers have been used in armed conflicts throughout history, current statistics portray a sobering

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1 Amy Beth Abbott, Note, *Child Soldiers—The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT’L L. REV. 499, 499–500 (2000).

2 As it is used throughout this Essay, the term “child soldier” is used to describe children—male or female—under the age of eighteen who serve an armed organization in any capacity. This broad understanding of child soldiers is consistent with UNICEF’s widely accepted Cape Town Principles. See *infra* note 7 and accompanying text.

3 Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT’L L.J. 415, 421 (2008).

4 See Crystal E. Lara, Note, *Child Soldier Testimony Used in Prosecuting War Crimes in the International Criminal Court: Preventing Further Victimization*, 17 SW. J. INT’L L. 309, 313 (2011); *Fact Sheet: Children Associated with Armed Groups and Forces Central Africa*, UNICEF, [https://www.unicef.org/wcaro/FactSheet100601Final\\_E\\_100603\\_.pdf](https://www.unicef.org/wcaro/FactSheet100601Final_E_100603_.pdf) (last visited Nov. 22, 2018); Douglas Farah, *Children Forced to Kill*, WASH. POST (Apr. 8, 2000), [https://www.washingtonpost.com/archive/politics/2000/04/08/children-forced-to-kill/f9403901-0b0f-480f-bad7-16bc78835c81/?utm\\_term=.00d98dd5fc10](https://www.washingtonpost.com/archive/politics/2000/04/08/children-forced-to-kill/f9403901-0b0f-480f-bad7-16bc78835c81/?utm_term=.00d98dd5fc10).

and distinctive trend: a steady increase in the use of individuals under the age of eighteen in warfare.

In response to this disturbing development, the international community has explicitly condemned the use and recruitment of child soldiers. While that much is clear, international conventions, U.N. resolutions, and international courts and tribunals have failed to explicitly answer two fundamental questions: Should child soldiers be prosecuted for their crimes? If so, at what age should children be held legally responsible for their actions, and what legal standard should apply? This Essay will explore this gap in international criminal law and the unique difficulty of determining the accountability of children who are both victims and perpetrators.

This Essay, in Part I, will begin with an overview of the use of child soldiers in armed conflicts around the world. Part II will explore provisions within the Geneva Conventions, the Convention on the Rights of the Child, and the Beijing Rules that are applicable to child soldiers and can shed some light on their culpability after an armed conflict. In Part III, this Essay will then discuss the varying degrees to which international criminal tribunals and the International Criminal Court have addressed the criminal responsibility of children for war crimes and crimes against humanity. Finally, Part IV will analyze this fragmented body of international criminal law and identify two overarching elements it shares: the best interest of the child standard and the emphasis on rehabilitation and reintegration. This Essay will argue that, in light of this consistent message and the realities of child soldiering, international criminal law must fix the minimum age of criminal liability at eighteen. This Essay will go on to argue that, should a State insist on prosecuting children during negotiations with the United Nations to create a hybrid domestic-international tribunal, a distinct legal standard with explicit protections for young perpetrators must be put in place.

## I. THE USE OF CHILD SOLDIERS ACROSS THE WORLD

### A. *Who Are Child Soldiers?*

Hundreds of thousands of children under the age of eighteen are currently serving in armed forces<sup>5</sup> in more than thirty countries around the world.<sup>6</sup> While many of these children are engaged directly in warfare, the term “child soldier” encompasses far more young people than those who carry weapons, engage in combat, or take a direct part in hostilities. As defined in UNICEF’s widely accepted Cape Town Principles, a child soldier is:

[A]ny person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for

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5 Child soldiers are used by a variety of armed groups, “including government-backed paramilitary groups, militias and self-defense units, armed groups opposed to central government, groups composed of ethnic religious and other minorities, and clan-based or factional groups fighting governments.” Lara, *supra* note 4, at 313.

6 Abbott, *supra* note 1, at 512.

forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.<sup>7</sup>

Although the specific number of children who are currently serving in armed forces is impossible to verify, most organizations agree that there are approximately 300,000 child soldiers across the globe.<sup>8</sup> The most widespread use of child soldiers occurs in developing countries, particularly those suffering from continuous political and economic instability, and those where a significant portion of the population is made up of children.<sup>9</sup> While the use of child soldiers is most prevalent in Africa, where more than 120,000 children are engaged in active combat,<sup>10</sup> juvenile involvement in armed conflict is not limited to that continent.<sup>11</sup> Beyond African countries such as the Democratic Republic of Congo, Nigeria, and Somalia, child soldiers are currently involved in armed conflicts in Burma, Iran, Iraq, Syria, and Yemen, among others.<sup>12</sup>

While “[n]o single common social denominator or personal motive links all the children who [have been] in combat,”<sup>13</sup> child soldiers generally come from similar backgrounds.<sup>14</sup> The first children to be recruited into armed groups are generally “the most vulnerable and disadvantaged children—those without traditional families to protect them, those with little or no education, and those from marginalized sectors of society.”<sup>15</sup> The vast majority of child soldiers come from poor, conflict-ridden areas and grow up knowing nothing but war.<sup>16</sup> Children who

7 UNICEF, CAPE TOWN PRINCIPLES AND BEST PRACTICES 12 (1997), [https://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf); see also UNICEF, THE PARIS PRINCIPLES: PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS 7 (2007), <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (broadly defining a child soldier as “[a] child associated with an armed force or armed group”).

8 Tessa Davis, Note, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 654 (2011).

9 Mary-Hunter Morris, Note, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 283 (2008).

10 Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 326 (2007). One of the reasons this practice is so prominent across Africa is because children make up the majority of the continent’s population. DAVID M. ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 62 (2005). Fifty-five percent of the total African population is nineteen years or younger (compared to the United States, where this age group only constitutes twenty-eight percent of the population). *Id.*

11 For a comprehensive list of the countries where children have served as child soldiers, see Tiefenbrun, *supra* note 3, at 422–32. For a breakdown of how many children are currently serving in various countries, see Farah, *supra* note 4.

12 Jo Becker, *A Better US List of Countries Using Child Soldiers*, HUM. RTS. WATCH (June 29, 2018), <https://www.hrw.org/news/2018/06/29/better-us-list-countries-using-child-soldiers>.

13 ROSEN, *supra* note 10, at 61.

14 Child soldiers generally fit this profile regardless of whether they are forcibly recruited or they voluntarily join an armed group. Lara, *supra* note 4, at 314.

15 Stephanie H. Bald, Comment, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?*, 18 AM. U. INT’L L. REV. 537, 545 (2002).

16 *Id.*; see also U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, ¶¶ 37–38, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter Machel Report] (explaining that children from poorer sectors are at a particularly high risk for

have been separated from their families or displaced from their homes are particularly vulnerable.<sup>17</sup> Although “the average age of child soldiers continues to decrease, a paradigmatic child soldier is in his or her late preteen to midteenage years with the average being between twelve and thirteen years old.”<sup>18</sup>

### B. Why Are Children Targeted to Fight?

The decision to target children stems not only from an armed group’s need to bolster their forces, but from characteristics inextricably linked to childhood. Children are generally more physically and psychologically vulnerable than adults, making them easier for armed forces to control, intimidate, and manipulate.<sup>19</sup> Children are also less demanding than adults, making them an economically efficient source of labor.<sup>20</sup> Unlike mature soldiers, children are generally willing to serve at the “bottom of [the] military hierarchy” and rarely demand pay.<sup>21</sup>

Groups also target young adolescents and children for their small size and sense of fearlessness. In many cases, a child’s size allows him or her to evade capture.<sup>22</sup> Children’s small size also enables military leaders to use them as “guinea pigs” for some of their most dangerous assignments.<sup>23</sup> Children are often forced “to the front lines or [through] minefields ahead of older troops while their commanders stay behind.”<sup>24</sup> While such assignments would sound like a death sentence to older soldiers, commanders can easily exploit fearless children who “view themselves as invulnerable to harm and injury.”<sup>25</sup> Finally, many armed groups target children because they consider them to be an expendable labor source, particularly as compared to trained adults.<sup>26</sup> In developing countries where children make up as much as half of the population, young people are “in such bountiful supply”<sup>27</sup> that “another child will always be available to abduct and exploit.”<sup>28</sup>

Though military groups have utilized child soldiers throughout history,<sup>29</sup> the deliberate recruitment of child soldiers has dramatically increased in recent years.

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recruitment, while children from wealthier and more educated families are at less risk); Tiefenbrun, *supra* note 3, at 431.

17 Davis, *supra* note 8, at 656.

18 *Id.* (footnotes omitted).

19 Tiefenbrun, *supra* note 3, at 432.

20 Davis, *supra* note 8, at 657.

21 *Id.*

22 *Id.* Not only is it easier for children to hide than adults, but opposing parties generally do not suspect children of being soldiers. *Id.*

23 Tiefenbrun, *supra* note 3, at 431.

24 *Id.*

25 *Id.* at 432–33 (quoting BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY 38 (9th ed. 2003)).

26 Davis, *supra* note 8, at 657.

27 *Id.* (quoting MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 37 (2006)).

28 *Id.*

29 “Children’s participation in armed conflict has occurred for centuries” and they have “fought in wars dating back to the Middle Ages.” Cristina Martinez Squires, Comment, *How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?*, 68 SMU L. REV. 567, 567 (2015). Until the mid-twentieth century, the armies of Western Europe and the

Two interrelated factors can explain this rise in the abduction and use of child soldiers.

First, fundamental changes in the nature of armed conflicts have increased the use of children as instruments of war. Unlike past conflicts, which were generally “temporary outbreaks of instability” between different states, today’s conflicts are characterized by “long, protracted states of mass violence and disorder.”<sup>30</sup> Since the end of the Cold War, the world’s conflicts have also become more internalized, often occurring between armed civilians or ethnic factions.<sup>31</sup> During these internalized conflicts, opposing sides generally do not distinguish between children and adults and the line between civilian and combatant is often blurred.<sup>32</sup> In addition, “[w]ars are no longer confined to definitive battlefields” and children often find themselves in war zones.<sup>33</sup> With fighting regularly occurring in populated areas, “recruiters can easily take children from villages, roadsides, buses, schools, markets, and churches.”<sup>34</sup> Further, modern armed warfare generally lasts much longer than past conflicts.<sup>35</sup> As casualties rise, some armed forces believe that recruiting children is an easy and necessary means of filling shortages in manpower.<sup>36</sup> The length of modern wars has also “encouraged military leaders to rationalize the forced recruitment and use of children as a low cost military measure.”<sup>37</sup>

Second, many argue that technological developments and the emergence of the small-arms trade have transformed the roles children are capable of playing in war. With the emergence of lightweight, easy-to-carry weapons, children are no longer limited to serving in indirect support roles such as lookouts, spies, or messengers.<sup>38</sup> Modern-day weapons such as assault rifles, machine guns, hand grenades, and pistols are easy to operate and can be used as effectively by children as adults.<sup>39</sup> These technological advances have made it much easier for young people to become

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United States were filled with “boy soldiers.” See generally ROSEN, *supra* note 10, at 4–8 (describing the prominence of American and British soldiers under the age of eighteen in the Revolutionary War, the Civil War, and World War I). See also *id.* at 19–56 (detailing the use of Jewish child soldiers during World War II).

30 Tiefenbrun, *supra* note 3, at 430. In her famous U.N. Report *The Impact of War on Children*, Graça Machel attributed the “callousness of modern warfare” to the breakdown of traditional societies brought about by globalization and social revolution. Machel Report, *supra* note 16, ¶ 4; see also *id.* ¶¶ 4, 24 (distinguishing traditional, rule-bound warfare from conflicts in postcolonial states where “all standards [are] abandoned” and a special “sense of dislocation and chaos” reigns).

31 Bald, *supra* note 15, at 544.

32 Lara, *supra* note 4, at 313–14.

33 Bald, *supra* note 15, at 542.

34 *Id.*

35 Tiefenbrun, *supra* note 3, at 428.

36 *Id.* at 430.

37 *Id.* at 428. In Angola, for instance, the civil war spanned over thirty years, making volunteers difficult to find. “To alleviate the manpower shortage, [Angola’s] rebel and government forces look[ed] to the nation’s youth to fill their army’s ranks.” Abbott, *supra* note 1, at 511.

38 ROSEN, *supra* note 10, at 14.

39 Tiefenbrun, *supra* note 3, at 431. But see ROSEN, *supra* note 10, at 14.

direct combatants in an armed conflict. As a result of the international arms trade, most of these weapons are relatively affordable and easy to obtain.<sup>40</sup>

### C. How Are Child Soldiers Recruited?

Children's recruitment in armed conflict is either by force or voluntary. A significant portion of the children who participate in armed conflicts are abducted or forcibly recruited after receiving threats.<sup>41</sup> Countless children have been taken from their own homes,<sup>42</sup> while others have been arbitrarily removed from public spaces such as buses, marketplaces, churches, and refugee camps.<sup>43</sup> Children who volunteer for service in armed groups may be driven to do so by a range of "cultural, social, economic or political pressures."<sup>44</sup> Most children who volunteer for participation in conflicts do so in order to fulfill their basic needs.<sup>45</sup> In war-torn and impoverished areas, children may think that alternative means of securing consistent food and shelter are simply unavailable.<sup>46</sup> For others, service with an armed group is seen as a means of ensuring their own safety.<sup>47</sup> Many children join "merely in an attempt to survive," understandably feeling safer as armed soldiers than as defenseless civilians.<sup>48</sup> Those who have grown up in a war-torn environment may feel obligated to join the military regime out of a sense of loyalty or in order to avenge the death or deaths of close family members and friends.<sup>49</sup> For some children, the decision stems from a desire to be part of a cohesive group.<sup>50</sup> "[Children] want to belong to something, especially if they live in a society that has collapsed completely," and armed groups can provide them with the structured community they seek.<sup>51</sup> Others are simply bored, attracted to the culture of violence they have been raised in, and lacking the education necessary to understand what they are signing up for.<sup>52</sup>

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40 Monique Ramgoolie, *Prosecution of Sierra Leone's Child Soldiers: What Message Is the UN Trying to Send?*, 12 J. PUB. & INT'L AFF. 145, 148 (2001). In some parts of Africa, AK-47s are available for less than six dollars. *Id.*

41 Tiefenbrun, *supra* note 3, at 423.

42 *Id.*

43 Abbott, *supra* note 1, at 514.

44 Machel Report, *supra* note 16, ¶ 38.

45 Abbott, *supra* note 1, at 516.

46 Many poor and hungry families are coerced to sell their children to armed forces in order to secure food or money. Tiefenbrun, *supra* note 3, at 432. "Many of these parents do not understand the danger they are subjecting their child[ren] to by making them join the army." *Id.*; see also Machel Report, *supra* note 16, ¶ 39.

47 Machel Report, *supra* note 16, ¶ 41 ("Faced with violence and chaos all around, they decide they are safer with guns in their hands.").

48 Abbott, *supra* note 1, at 516.

49 *Id.*; see also Tiefenbrun, *supra* note 3, at 431–32.

50 Errol Barnett, *Ex-Child-Soldier: "Shooting Became Just Like Drinking a Glass of Water,"* CNN (Oct. 9, 2012), <http://www.cnn.com/2012/10/08/world/africa/ishmael-beah-child-soldier/index.html>.

51 *Id.*

52 ROSEN, *supra* note 10, at 61; Tiefenbrun, *supra* note 3, at 427.

*D. What Roles Do Child Soldiers Play in Armed Conflict?*

After child soldiers are conscripted, they “enter a new world”<sup>53</sup> filled with violence and “the worst forms of child abuse.”<sup>54</sup> From the beginning of their association with the armed group, young people are deliberately exposed to horrific scenes and “forced to participate in acts of extreme violence and barbarity including beheadings, amputations, rape, and the burning of people alive.”<sup>55</sup> Desensitizing children to the sight and commission of atrocities “brainwashe[s them] . . . until their ethics and moral values become so distorted” that they robotically obey orders.<sup>56</sup>

For many child soldiers, participation in armed conflict begins with brutal hazing practices aimed at desensitizing them to violence and turning them into hardened, dangerous killing machines. These indoctrination procedures can “include everything from torture and beatings inflicted upon the new recruit to forcing him or her to commit these atrocities on others.”<sup>57</sup> In order to keep the child firmly within the army’s control, many are forced to commit acts of violence against their families, friends, or members of their communities as part of their indoctrination.<sup>58</sup> Forcing children to kill or disfigure someone they know effectively dissolves their ties with the world outside of the armed group and ensures that they will be permanently alienated from their family and community.<sup>59</sup> Over the course of their association with the armed group, “[c]hildren endure torture, physical abuse, and threats of death” to maintain their obedience.<sup>60</sup> Military officials do not hesitate to execute attempted escapees,<sup>61</sup> and children are threatened with death or dismemberment if they refuse to fight.<sup>62</sup>

Fighting groups generally do not afford child soldiers any special treatment because of their young age.<sup>63</sup> To the contrary, child soldiers generally “suffer[] additional exploitive abuse because of their age.”<sup>64</sup> Because they are viewed as expendable, children are often given the most dangerous tasks and pushed to the front lines. Armed groups often capitalize on a child’s size and inexperience by using them to clear unexplored areas or sending them “to serve as advance forces in ambush attacks and in suicide bombings.”<sup>65</sup> Since “[t]he youngest children rarely appreciate the perils they face,” many armed groups use hallucinatory drugs or alcohol to further manipulate their child soldiers and capitalize on their

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53 Davis, *supra* note 8, at 658.

54 ROSEN, *supra* note 10, at 16.

55 Tiefenbrun, *supra* note 3, at 425.

56 *Id.* at 423.

57 Grossman, *supra* note 10, at 328.

58 *Id.*

59 ROSEN, *supra* note 10, at 16.

60 Davis, *supra* note 8, at 658.

61 Tiefenbrun, *supra* note 3, at 423. Children are often “required to kill friends who don’t obey the commanders, and made to watch the punishment of other child soldiers who attempt in vain to escape.” *Id.*

62 *Id.*

63 See Bald, *supra* note 15, at 552.

64 *Id.*

65 Abbott, *supra* note 1, at 507–08.



fearlessness.<sup>66</sup> Those who are not engaged directly in combat serve in “support functions which entail great risk and hardship.”<sup>67</sup>

Although the majority of child soldiers are boys, armed groups also recruit girls, many of whom perform combat functions.<sup>68</sup> In addition to the roles they share with their male counterparts, female child soldiers also face gender-specific abuses. Many are “given to military commanders as ‘wives,’ and victimized by sexual violence on a daily basis.”<sup>69</sup>

## II. INTERNATIONAL CRIMINAL LAW’S GUIDANCE ON THE CULPABILITY OF CHILDREN INVOLVED IN ARMED CONFLICT

While there is not one particular instrument that clearly lays out whether children involved in armed conflicts should be held accountable for their crimes, various binding and nonbinding sources of international law can shed some light on this question. This Part will explore three sources of international law that are particularly relevant to the culpability of child soldiers: the Geneva Conventions of 1949 and their Additional Protocols of 1977, the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict, and the Beijing Rules.<sup>70</sup> While these treaty-based laws seem to permit the arrest, trial, and imprisonment of child soldiers, none of these instruments establish a minimum age of criminal liability.

### A. *The Geneva Conventions of 1949 and the Additional Protocols of 1977*

The four Geneva Conventions of 1949 are at the core of international humanitarian law. Each of the Conventions seeks to protect people who are not taking part in international hostilities, and the fourth Convention provides specific standards for the treatment of civilians, including children, in times of war.<sup>71</sup> Though the Conventions contemplate the possibility that minors can commit war crimes and can lawfully be prosecuted for their acts, they fail to set a minimum age

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<sup>66</sup> Machel Report, *supra* note 16, ¶ 47.

<sup>67</sup> *Id.* ¶ 44 (listing child soldiers’ various support functions, including serving as porters and performing household duties).

<sup>68</sup> Jan Goodwin, *Sierra Leone Is No Place to Be Young*, N.Y. TIMES (Feb. 14, 1999), <http://www.nytimes.com/1999/02/14/magazine/sierra-leone-is-no-place-to-be-young.html>.

Young girls “make up forty percent of the ranks of armed groups in some countries.” Tiefenbrun, *supra* note 3, at 424.

<sup>69</sup> *Id.* at 424; *see also, e.g.*, Machel Report, *supra* note 16, ¶ 45 (describing the practice of marrying off girls abducted by the Lord’s Resistance Army in Uganda to rebel leaders); Goodwin, *supra* note 68 (recounting the experience of “I,” a young Sierra Leonean girl who was abducted from her village and forced to become a sex slave for rebel forces).

<sup>70</sup> Other nonbinding sources of international law that are relevant to the culpability of child soldiers but are beyond the scope of this Essay include the Cape Town Principles and Best Practices, the Paris Principles, and the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups.

<sup>71</sup> *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 50, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (concerning the care and education of children during times of war).

of criminal responsibility. Apart from excluding children from capital punishment,<sup>72</sup> no distinction is made in the Geneva Conventions between prosecuting adults and juveniles.

Additional Protocols I and II of 1977 add much-needed clarity to the standards of treatment of children during an armed conflict, but still leave many questions regarding their culpability open to debate. Additional Protocol I, which focuses on the protection of civilians in international armed conflicts, emphasizes that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault.”<sup>73</sup> The Protocol added a provision obligating States to prevent children under the age of fifteen from taking part in international armed conflict<sup>74</sup> and reiterated Convention IV’s prohibition on the death penalty for youthful offenders.<sup>75</sup> Though Brazil’s representative suggested during the drafting period that Additional Protocol I should include a minimum age of criminal responsibility, the Committee ultimately decided to leave the issue to national regulation.<sup>76</sup>

Additional Protocol II, which focuses on the protection of civilians in internal armed conflicts, echoes many of these provisions. Article 4 provides that “[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities,”<sup>77</sup> and Article 6 “applies to the prosecution and punishment of criminal offences related to the armed conflict.”<sup>78</sup> Again, no explicit guidance is given in Additional Protocol II as to whether child soldiers can or should be prosecuted for their crimes. Article 6 limits itself to banning the death penalty for crimes committed by children,<sup>79</sup> enumerating a series of due process rights to which offenders are entitled,<sup>80</sup> and broadly stating that “[a]t

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72 See *id.* art. 68 (“In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.”).

73 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) art. 77, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

74 *Id.* art. 77, ¶ 2 (“The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those . . . who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.”).

75 *Id.* art. 77, ¶ 5 (“The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.”).

76 During the negotiations of Additional Protocol I, the representative of Brazil proposed that Article 77 include a prohibition on the prosecution of children under the age of sixteen. See Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 74 (2008).

77 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, ¶ 3(c), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

78 *Id.* art. 6, ¶ 1.

79 *Id.* art. 6, ¶ 4.

80 *Id.* art. 6, ¶¶ 2, 3.

the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict.”<sup>81</sup>

*B. The Convention on the Rights of the Child and the Optional Protocol on the Involvement of Children in Armed Conflict*

The United Nations Convention on the Rights of the Child (“CRC”) is the most widely ratified human rights instrument in history.<sup>82</sup> It was the first U.N. convention devoted solely to children’s rights, and it remains the most comprehensive treaty concerned with issues related to children’s well-being today.<sup>83</sup> Despite its wide-ranging protections for children,<sup>84</sup> the CRC dances around the accountability of children who commit crimes. The CRC’s sometimes-contradictory provisions seem to allow for the criminal prosecution and imprisonment of juvenile offenders, but the Convention fails to set a minimum age of criminal responsibility. Though the Convention clearly defines a child as “every human being below the age of eighteen years,”<sup>85</sup> it opts to allow its State Parties to determine whether children should be prosecuted for crimes committed during armed conflicts.<sup>86</sup>

The overriding substantive mandate of the CRC can be found in Article 3, which requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>87</sup> Under this “umbrella provision,” “when two or more rights are in apparent conflict, the best interests of the child is the guiding consideration.”<sup>88</sup>

Articles 37 and 40 provide extensive due process rights for children and give some important insights into whether they should be prosecuted for crimes committed as minors. First and foremost, the CRC states that children cannot be “deprived of [their] liberty unlawfully or arbitrarily” and, should “arrest, detention or imprisonment” be considered appropriate in a particular case, it “shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>89</sup> Like the Geneva Conventions and their Additional Protocols, the CRC bans capital

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81 *Id.* art. 6, ¶ 5.

82 The CRC has been ratified by every country in the world except the United States and Somalia. Tiefenbrun, *supra* note 3, at 439.

83 Abbott, *supra* note 1, at 502–03.

84 The CRC broadly covers “three baskets” of rights to which all children are entitled. Linda A. Malone, *Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court*, 43 GA. J. INT’L & COMP. L. 599, 602 (2015). “First, they have to be provided with adequate nutrients, shelter, family environment, education, healthcare and recreation. Second, they should be protected from abuse and exploitation. Third, they should participate in decision making for themselves and in social, economic, religious, and political life.” *Id.*

85 Convention on the Rights of the Child art. 1, Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter Convention on the Rights of the Child].

86 *See infra* notes 94–95 and accompanying text.

87 Convention on the Rights of the Child, *supra* note 85, art. 3, ¶ 1.

88 Malone, *supra* note 84, at 617.

89 Convention on the Rights of the Child, *supra* note 85, art. 37(b).

punishment.<sup>90</sup> Article 37(a) adds that children also should not be sentenced to “life imprisonment without possibility of release . . . for offences committed [when they were] below eighteen years of age.”<sup>91</sup> Article 40 goes on to say that, when dealing with children who have “infringed the penal law,” “States Parties . . . [shall] take[] into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”<sup>92</sup> Though Article 40 lays out a list of due process guarantees “[e]very child alleged as or accused of having infringed the penal law” is entitled to,<sup>93</sup> the CRC leaves it to State Parties to set a baseline age of criminal responsibility.<sup>94</sup> As a result of this provision, the minimum age of criminal responsibility is left up to national legislatures and varies widely from country to country.<sup>95</sup> Article 40 also leaves it to State Parties to determine when it is “appropriate and desirable” to institute “measures for dealing with such children without resorting to judicial proceedings.”<sup>96</sup>

The CRC provision most directly related to the recruitment and use of child soldiers is Article 38. Article 38 prohibits State Parties from recruiting anyone under the age of fifteen into their armed forces and requires them to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”<sup>97</sup> This provision falls short in a number of respects. In addition to ignoring the use of child soldiers by nonstate actors, Article 38 does not protect children from serving in roles indirectly related to combat. It also does not protect children who “volunteer” for service in armed conflicts. Recognizing these deficiencies and the modern rise in the use of child soldiers around the world, the CRC was amended in 2000 to include the Optional Protocol on the Involvement of Children in Armed Conflict.<sup>98</sup> The Optional Protocol is now the international

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90 *Id.* art. 37(a).

91 *Id.*

92 *Id.* art. 40, ¶ 1.

93 *See id.* art. 40, ¶ 2(b)(i)–(vii).

94 *Id.* art. 40, ¶ 3(a). This wide grant of power to the CRC’s State Parties is not without limit. General Comment 10 to the CRC adds that the age of twelve should be the absolute minimum age of criminal responsibility. Comm. on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, ¶ 32, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

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A sampling of baseline ages of criminal responsibility over the past decade include: seven (Switzerland, Nigeria, South Africa); ten (Australia, New Zealand); twelve (Canada, Netherlands, Uganda); thirteen (France, Afghanistan); fourteen (Japan, Germany, Austria, Italy, Russian Federation, Sierra Leone); fifteen (Sweden, Norway, Denmark); sixteen (Spain, Portugal); and eighteen (Belgium, Brazil, Peru).

MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 104 (2012).

96 Convention on the Rights of the Child, *supra* note 85, art. 40(3)(b). This provision suggests a variety of alternatives to judicial proceedings and institutional care, including “care, guidance and supervision orders; counselling; probation; foster care; [and] education and vocational training programmes.” *Id.* art. 40(4).

97 *Id.* art. 38, ¶¶ 2–3.

98 *See* Malone, *supra* note 84, at 601; Tiefenbrun, *supra* note 3, at 442–45.

community's main legal instrument addressing the use of children as soldiers, and it has been ratified nearly as widely as the CRC.<sup>99</sup>

Recognizing that the CRC's standard for recruitment had not adequately protected children, the Optional Protocol greatly strengthened the Convention by amending the minimum age for compulsory recruitment. Under Articles 2 and 4 of the Optional Protocol, both state and nonstate forces cannot forcibly recruit children under the age of eighteen.<sup>100</sup> While nonstate forces are also prohibited from accepting voluntary recruits under the age of eighteen,<sup>101</sup> that rule does not necessarily extend to State Parties. A loophole can be found in Article 3, which requires States to "raise the minimum age for . . . voluntary recruitment" above fifteen but sets no hard and fast line requiring the minimum age to exceed eighteen years of age.<sup>102</sup> Hypothetically, national armed forces could accept voluntary recruits who are fifteen years and one day old so long as some of the "safeguards" set out in Article 3 of the Optional Protocol are in place.<sup>103</sup>

Despite the confusing provisions regarding compulsory and voluntary recruitment of children in these instruments, both Article 38 and the Optional Protocol clearly emphasize the importance of rehabilitating child soldiers and reintegrating them into their communities. Reiterating the Convention's focus on the best interests of the child, Article 39 of the CRC provides that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts."<sup>104</sup> The Optional Protocol builds on this provision, adding that "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities . . . are demobilized" and given "all appropriate assistance for their physical and psychological recovery and their social reintegration."<sup>105</sup>

### C. The Beijing Rules

The U.N. Nations Standard Minimum Rules on the Administration of Juvenile Justice, more commonly known as "the Beijing Rules," is a set of guidelines for the minimum treatment of children in the juvenile justice system.<sup>106</sup> While the Rules

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99 One hundred and sixty-seven states are currently parties to the Optional Protocol; another twelve have signed it but have not ratified it. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Optional Protocol on the Involvement of Children in Armed Conflict*, UNITED NATIONS, <https://childrenandarmedconflict.un.org/tools-for-action/opac/> (last visited Dec. 17, 2018).

100 Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, arts. 2, 4, ¶ 1, U.N. Doc. A/RES/54/263 (Mar. 16, 2001) [hereinafter *Optional Protocol to the CRC*].

101 *Id.* art. 4, ¶ 1.

102 *Id.* art. 3, ¶ 1.

103 *See id.* art. 3, ¶¶ 2–3.

104 Convention on the Rights of the Child, *supra* note 85, art. 39.

105 Optional Protocol to the CRC, *supra* note 100, art. 6, ¶ 3; *see also id.* art. 7, ¶ 1 (requiring State Parties to "cooperate in the implementation of the present Protocol, including in . . . the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol").

106 Noëlle Quénivet, *Does and Should International Law Prohibit the Prosecution of Children for War Crimes?*, 28 EUR. J. INT'L L. 433, 439 (2017). These guidelines were the product of a

are not binding, they are meant to serve as a model to U.N. Member States. Several of the basic principles set out in the Beijing Rules are relevant to the treatment of child soldiers.

Like the Geneva Conventions and the CRC, the Beijing Rules fail to set a clear minimum age of liability. Instead, the Rules broadly allow “those legal systems recognizing the concept of the age of criminal responsibility for juveniles” to fix liability at an age of their choice so long as it is not “too low.”<sup>107</sup>

Though the Beijing Rules do not negate the capacity of young offenders to commit offenses or remove a State’s ability to prosecute them, they repeatedly stress that “[t]he juvenile justice system shall emphasize the well-being of the juvenile.”<sup>108</sup> The Beijing Rules clearly favor diversion to community services over institutionalization, which they describe as “a disposition of last resort and for the minimum necessary period.”<sup>109</sup> The Rules provide an extensive list of alternatives to institutionalization that “shall be made available to the competent authority,” including probation, community service, intermediate treatment, and group counseling.<sup>110</sup> Like Additional Protocol II and the CRC, the Beijing Rules also enumerate a series of due process protections for children in the juvenile justice system<sup>111</sup> and expressly prohibit capital and corporal punishment.<sup>112</sup>

### III. CHILD SOLDIERS, INTERNATIONAL CRIMINAL TRIBUNALS, AND THE INTERNATIONAL CRIMINAL COURT

Much like the United Nation’s conventions and policy guidelines, the United Nation’s international criminal tribunals and the International Criminal Court have largely sidestepped the question of children’s culpability. This Part will discuss the

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meeting of the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. See Barry Goldson & John Muncie, *Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence*, 6 YOUTH JUST. 91, 96 (2006).

107 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), ¶ 4.1, U.N. Doc. A/Res/40/33 (Nov. 29, 1985) [hereinafter Beijing Rules]. In setting the minimum age of criminal responsibility, the Beijing Rules require States to “bear[] in mind the facts of emotional, mental and intellectual maturity.” *Id.* Commentary to the Rule explains that disparities in national ages of criminal responsibility are inevitable given cultural and historical differences between States and will range “from 7 years to 18 years or above.” See *id.* ¶ 2, cmt. 2.2.

108 *Id.* ¶ 5.1; see also *id.* ¶ 17.1(d) (“The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.”). Unlike other instruments of international law, the Beijing Rules also instruct juvenile justice systems to take considerations of a child’s individual circumstances and the circumstances of the offense into account. See, e.g., *id.* ¶ 5.1 (“[A]ny reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”).

109 *Id.* ¶ 19.1; see also *id.* ¶ 18.1 (stating that institutionalization should be avoided “to the greatest extent possible”).

110 *Id.* ¶ 18.1(a)–(h).

111 *Id.* ¶ 7.1 (providing that “at all stages of proceedings” a series of “[b]asic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal” must be available to the juvenile).

112 *Id.* ¶¶ 17.2, 17.3.

Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court and the varying degrees to which they have addressed the criminal responsibility of children.

#### A. *Early International Criminal Tribunals*

Despite the fact that thousands of child soldiers participated in armed conflicts throughout the twentieth century, the earliest international criminal tribunals completely failed to address children's culpability. Soldiers below the age of eighteen fought for both sides in World War II, but no mention was made of the age at which criminal responsibility began in the Nuremberg Charter.<sup>113</sup> The Nuremberg Military Tribunal, the international community's first ad hoc court, did not charge anyone under the age of eighteen for crimes committed during the war.<sup>114</sup>

For several decades after World War II, "international criminal law largely remained silent on the question of the penal responsibility of minors for extraordinary international crimes."<sup>115</sup> When the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the first court of its kind in half a century, it again failed to address the culpability of child soldiers in its charter.<sup>116</sup> The two youngest people prosecuted by the ICTY, Anto Furundžija and Dražen Erdemović, were both twenty-three years old at the time of the commission of their crimes.<sup>117</sup> When the International Criminal Tribunal for Rwanda (ICTR) was established the following year, the Security Council again offered no guidance regarding the age of criminal responsibility.<sup>118</sup> Though children as young as five were accused of participating in the genocide, the tribunal left it to Rwanda's national courts to decide whether young people should be prosecuted for their offenses.<sup>119</sup> Like the ICTY, the ICTR did not prosecute anyone who was under

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113 Malone, *supra* note 84, at 605. *See generally* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284 (limiting the Tribunal's jurisdiction to "major war criminals" but failing to impose a minimum age of liability). There was also no mention of the age at which criminal responsibility began in Control Council Law No. 10 or Control Council Ordinance No. 7. DRUMBL, *supra* note 95, at 117.

114 DRUMBL, *supra* note 95, at 117. The closest the Nuremberg Tribunal came to the issue of children's culpability was during its prosecution of Baldur von Schirach, a Nazi German politician who was the head of the Hitler Youth from 1931 to 1940. *Id.* "Although the [International Military Tribunal] prosecuted Baldur von Schirach for *inter alia* his use of the Hitler Youth, it did not address crimes committed by the youth themselves." *Id.* Relatedly, the Tokyo Tribunal only conducted trials of the Japanese leadership and did not prosecute any minors. *Id.*

115 *Id.* at 118.

116 *See generally* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

117 Quéniwet, *supra* note 106, at 446.

118 *See generally* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

119 National institutions in Rwanda have tried multiple people who were under the age of eighteen at the time of the genocide for their involvement therein. *See infra* notes 190–1 and accompanying text.

the age of eighteen at the time they committed their offense.<sup>120</sup> In the absence of language to the contrary, both the ICTY and the ICTR's statutes could be interpreted to permit the prosecution of child soldiers for their crimes.<sup>121</sup>

### B. *The Special Court for Sierra Leone*

Sierra Leone's civil war was "one of the most brutal in Africa."<sup>122</sup> Over the course of the eleven-year conflict, half of Sierra Leone's population was displaced, thousands of children were separated from their families, over fifty thousand people were killed, and thousands of people were mutilated.<sup>123</sup> While these statistics are jarring, what truly set this conflict apart from others was the unprecedented use of child soldiers.<sup>124</sup> Throughout the conflict, both the national government's army and the infamous Revolutionary United Front's (RUF) rebel forces<sup>125</sup> placed children as young as seven on the front lines. At any one time, an estimated five thousand children were serving as soldiers, fighting on both sides of the war.<sup>126</sup> Children "spread unspeakable fear throughout" the country and "were responsible for thousands of murders, mutilations, and rapes, and for torture, forced labor, and sexual slavery."<sup>127</sup> Under the influence of narcotics and alcohol, children were

120 UNICEF, CHILDREN AND TRUTH COMMISSIONS 17 (2010). Given the uncertainty in the statute, the ICTR's lead prosecutor "decided that children aged 14 to 18 would not be tried by the ICTR or called as witnesses to testify." *Id.*

121 While some argue that these omissions from the ICTY and the ICTR's jurisdiction were intentional and suggest that the courts would be entitled to prosecute a minor, "others have argued that such a deliberate omission 'seems to have been premised on a belief that such a provision was unnecessary as no such prosecutions would take place.'" Alice S. Debarre, *Rehabilitation and Reintegration of Juvenile War Criminals: A De Facto Ban on Their Criminal Prosecution?*, 44 DENV. J. INT'L L. & POL'Y 1, 6 (2015) (quoting Happold, *supra* note 76, at 84-85).

122 Ismene Zarifis, *Sierra Leone's Search for Justice and Accountability of Child Soldiers*, 9 HUM. RTS. BRIEF 18, 18 (2002), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1459&context=hrbrief>. For a brief overview of the origins of the conflict and its ultimate conclusion in 2001, see *The Armed Conflict in Sierra Leone*, HUM. RTS. WATCH (Apr. 11, 2012), <https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone>.

123 Ramgoolie, *supra* note 40, at 147.

124 *Id.* at 146; see also ROSEN, *supra* note 10, at 2 ("Sierra Leone is the poster-child case of the modern child-soldier crisis."); Ramgoolie, *supra* note 40, at 147 ("Child combatants played an unprecedented, large, and violent role in the Sierra Leone civil war . . ."). For the story of one child soldier's abduction, service in the RUF, and eventual rehabilitation, see ISHMAEL BEAH, *A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER* (2007).

125 The RUF committed countless gross human rights violations over the course of Sierra Leone's civil war and "evolved into one of the worst agents of terror in contemporary Africa." ROSEN, *supra* note 10, at 60. "Widespread and indiscriminate murder, rape, and amputation of limbs were signature crimes of the RUF." Zarifis, *supra* note 122, at 19.

126 ROSEN, *supra* note 10, at 61. By some estimates, half of all RUF combatants were between the ages of eight and fourteen. *Id.* at 62; see also Goodwin, *supra* note 68 (estimating that children made up between forty and fifty percent of the RUF's total force of around 15,000). On the Government side, officials have admitted that children composed a fifth of their forces. *Id.*

127 ROSEN, *supra* note 10, at 58.



easily manipulated into committing many of the most atrocious murders, amputations, and mutilations during the civil war.<sup>128</sup>

After observing the seriousness of the situation in Sierra Leone, the U.N. Security Council took its first major step toward the creation of the Special Court for Sierra Leone (SCSL) when it unanimously passed Security Council Resolution 1315 (“Resolution 1315”) in 2000.<sup>129</sup> Resolution 1315 proposed a novel structure for the SCSL. Unlike the ICTY and ICTR, which were established pursuant to Security Council resolutions and granted Chapter VII powers, the Security Council proposed a domestic-international hybrid tribunal that would be created pursuant to a treaty-based agreement.<sup>130</sup> The proposed court would incorporate aspects of both international and domestic law and would be jointly administered by the Sierra Leonean government and the United Nations.<sup>131</sup>

Resolution 1315 authorized the Secretary General, Kofi Annan, to negotiate an agreement with Sierra Leone’s government to create this independent special court.<sup>132</sup> Given the pervasive use of child soldiers throughout the conflict and the scale of the atrocities they committed, the criminal culpability of young people was one of the most contentious issues during those negotiations.<sup>133</sup> Sierra Leone’s government and numerous Sierra Leoneans who had suffered at the hands of child soldiers felt that justice could not be served unless some children were put on trial for their crimes.<sup>134</sup> Many international humanitarian groups and U.N. representatives, on the other hand, lobbied against prosecuting anyone who was below the age of eighteen at the time of their crimes.<sup>135</sup>

In the report he prepared for the Security Council, Kofi Annan prefaced his discussion of this contentious issue by stating that “most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.”<sup>136</sup> He went on to clarify that “although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims.”<sup>137</sup> Nonetheless, Secretary-General Annan ultimately recommended that “in view of the most horrific aspects of the child combatancy in Sierra Leone,” the court “would not necessarily exclude persons of young age from [its] jurisdiction.”<sup>138</sup>

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128 See Mark Iacono, Note, *The Child Soldiers of Sierra Leone: Are They Accountable for Their Actions in War?*, 26 SUFFOLK TRANSNAT’L L. REV. 445, 449 (2003); see also DRUMBL, *supra* note 95, at 80 (“In Sierra Leone, . . . commonly used drugs included cannabis, cocaine, amphetamines, and barbiturates. At times, powdered cocaine or heroin was mixed with gunpowder, resulting in a concoction known as *brown-brown*.”).

129 See generally S.C. Res. 1315 (Aug. 14, 2000).

130 See generally *id.*

131 *Id.* ¶ 2.

132 *Id.* ¶ 1.

133 See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 32–38, U.N. Doc. S/2000/915 (Oct. 4, 2000).

134 See *id.* ¶ 35.

135 See *id.*

136 *Id.* ¶ 32.

137 *Id.* ¶ 7.

138 *Id.* ¶ 36.

After extensive negotiations, Sierra Leone and the United Nations agreed upon the Statute of the Special Court of Sierra Leone in January 2002 (“the Statute”).<sup>139</sup> The court was given “the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”<sup>140</sup> Adopting the Secretary-General’s recommendation, the court’s jurisdiction was extended to persons who were between the ages of fifteen and eighteen at the time of the commission of their crimes.<sup>141</sup> It was the first time in history that an international tribunal was legally empowered to prosecute individuals who were under the age of eighteen. The Statute added additional safeguards for juvenile offenders, requiring that:

Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.<sup>142</sup>

Though juvenile offenders could be subjected to a full trial under this provision, the Statute granted them the presumption of rehabilitation and reintegration into Sierra Leonean society and immunized them from imprisonment.<sup>143</sup>

Although the Statute left the door open for children to be tried for their crimes, the Prosecutor for the Court, David Crane, quickly made it very clear that he would never prosecute anyone under the age of eighteen.<sup>144</sup> In a 2002 press release, Crane said, “[t]he children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes.”<sup>145</sup> Consistent with his word, the SCSL became the first tribunal to convict individuals

139 Bald, *supra* note 15, at 560.

140 Statute of the Special Court for Sierra Leone art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute].

141 *Id.* art. 7, ¶ 1. It was never made explicitly clear why the minimum age of criminal responsibility was fixed at fifteen, but:

[I]t seems that the intention was to mirror the provisions on the recruitment and use of child soldiers in the two [Additional Protocols] and the CRC, on the ground that if children under fifteen are too young to be recruited, they must be too young to be held criminally accountable for their actions.

Happold, *supra* note 76, at 80.

142 SCSL Statute, *supra* note 140, art. 7, ¶ 1.

143 *See id.* art. 7, ¶ 2. The Court was limited to providing rehabilitative sentences, including “care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.” *Id.*

144 *See* DRUMBL, *supra* note 95, at 123.

145 Press Release, Special Court for Sierra Leone Public Affairs Office, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> (statement of David Crane, Prosecutor for the Special Court for Sierra Leone).

for the recruitment and use of child soldiers.<sup>146</sup> No one who was below the age of eighteen at the time of their crimes was prosecuted.<sup>147</sup>

### C. *The International Criminal Court*

The International Criminal Court (ICC), a permanent international tribunal with jurisdiction over “[t]he crime of genocide; [c]rimes against humanity; [w]ar crimes; [and t]he crime of aggression,” was officially established pursuant to the Rome Statute in 2002.<sup>148</sup> In striking contrast to the Nuremberg Charter and the statutes creating the ICTY and the ICTR, the Rome Statute contains numerous references to children.<sup>149</sup> Child-specific provisions occur throughout the Rome Statute’s list of substantive offenses in Articles 6, 7, and 8.<sup>150</sup> Building off of the innovative provisions developed for the SCSL, Article 8 classifies the act of “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” as a war crime.<sup>151</sup>

Since the Rome Statute came into force in 2002, “crimes committed against children during armed conflict have figured prominently in indictments issued by the ICC.”<sup>152</sup> In the first case before the ICC, Thomas Lubanga Dyilo, a former warlord from the Democratic Republic of Congo, was found guilty on charges of conscripting, enlisting, and using child soldiers under the age of fifteen to actively participate in the rebel forces under his command.<sup>153</sup> Building on this precedent, the

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146 See ROSEN, *supra* note 10, at 146. For a list of the individuals who were charged with unlawfully recruiting children under the age of fifteen, see *id.* at 147; see also Steven Freeland, *Mere Children or Weapons of War—Child Soldiers and International Law*, 29 U. LA VERNE L. REV. 19, 20–21 (2008) (describing the SCSL’s prosecution and sentencing of RUF leaders, the former President of Liberia, and others on charges of conscripting or enlisting children into armed forces and using them to participate actively in hostilities).

147 See DRUMBL, *supra* note 95, at 123.

148 Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

149 See, e.g., *id.* pmb. (“[D]uring this century millions of children . . . have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”).

150 Note that, despite its groundbreaking inclusion of children in many of its substantive and procedural provisions, the Rome Statute does not contain a definition of a “child.”

151 Rome Statute, *supra* note 148, art. 8, ¶ 2(e)(vii). The Rome Statute classifies the act of conscripting or enlisting children under the age of fifteen as a war crime in both international armed conflicts and in “armed conflict not of an international character.” *Id.* art. 8, ¶ 2(c); see also *id.* art. 8, ¶ 2(b)(xxvi). Recognizing the additional atrocities that young girls conscripted into armed groups face, the Rome Statute also makes “rape, sexual slavery, enforced prostitution, [and] forced pregnancy” a war crime. *Id.* art. 8, ¶ 2(b)(xxii).

152 Office of the Special Representative of the Sec’y-Gen. for Children & Armed Conflict, *Role of the International Criminal Court*, UNITED NATIONS, <https://childrenandarmedconflict.un.org/our-work/role-of-the-icc/> (last visited Dec. 18, 2018) [hereinafter Role of the ICC].

153 See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Summary of the Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012). In this groundbreaking decision, the ICC also acknowledged “that the distinction between voluntary and forced recruitment is artificial and recognized the broader interpretation of the definition of child soldiers to include girls and boys who serve in support roles.” Role of the ICC, *supra* note 152.

ICC has prosecuted other individuals for the exploitation of child soldiers in the Democratic Republic of Congo,<sup>154</sup> Uganda,<sup>155</sup> and the Central African Republic.<sup>156</sup>

In addition to creating a forum for prosecuting those responsible for conscripting children, the Rome Statute clearly excludes young people from the jurisdiction of the ICC. Article 26 provides that “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”<sup>157</sup> Article 26 “elicited only brief discussion at the Rome Conference, where delegates were reluctant to engage with the conundrum of children as atrocity perpetrators.”<sup>158</sup> Given the wide-ranging ages of criminal responsibility among nations, the drafters decided that it was best to leave the decision to prosecute children for crimes proscribed by the Rome Statute to state discretion.<sup>159</sup> Other reasons the drafters of the Rome Statute cited for excluding children from the ICC’s jurisdiction included “resource constraints, curial competence regarding juvenile justice, sentencing issues, and the ability to provide specialized detention facilities for juveniles and properly trained staff.”<sup>160</sup>

While Article 26 clearly excludes the ICC’s jurisdiction over child soldiers, it does not close the question of their culpability before other international tribunals. “Indeed, Article 26 was arguably not based on the belief that children under eighteen” are incapable of committing war crimes or should not be prosecuted for their actions, “but rather on the sense that this decision should be left to state discretion.”<sup>161</sup>

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154 See *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014); *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012).

155 See *Prosecutor v. Kony*, Case No. ICC-02/04-01/05 (ongoing); *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen (Mar. 23, 2016) (ongoing).

156 See generally *Prosecutor v. Gombo*, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute (Oct. 19, 2016); *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016).

157 Rome Statute, *supra* note 148, art. 26. Given this limit on the ICC’s jurisdiction, the closest the ICC has come to prosecuting a child soldier is its ongoing prosecution of Dominic Ongwen, a prior commander of the Lord’s Resistance Army. See DARIJA MARKOVIĆ, CHILD SOLDIERS: VICTIMS OR WAR CRIMINALS? 12–13 (2015), [http://www.ra-un.org/uploads/4/7/5/4/47544571/paper\\_\\_2\\_.pdf](http://www.ra-un.org/uploads/4/7/5/4/47544571/paper__2_.pdf). Ongwen was indicted for the commission of war crimes and crimes against humanity in Uganda that he committed when he was about twenty-nine years old. *Id.* However, Ongwen was a child soldier before rising through the ranks of the LRA; like so many other Ugandan children, he was abducted by the LRA in broad daylight while walking to school. *Id.*

158 DRUMBL, *supra* note 95, at 119.

159 *Id.* at 121. Some have argued that this decision “meshes with . . . Article 17 of the Rome Statute, [which] provides that national jurisdictions shall have the first opportunity to investigate and prosecute allegations of Rome Statute crimes.” *Id.*

160 *Id.* at 120.

161 Debarre, *supra* note 121, at 7.

## IV. CLOSING THE GAP

Though recent international efforts mark clear advancements in the protection of children's rights, one major gap persists: clear law relating to the culpability and prosecution of child soldiers. While the international community has explicitly and repeatedly condemned the enlistment and use of child soldiers in hostilities, it remains unclear whether children can or should be prosecuted for international crimes they commit in the context of armed conflicts. Apart from the ICC and the Special Court for Sierra Leone, no international convention or court has explicitly addressed this issue.

The body of law surveyed in Parts II and III of this Essay demonstrates that there is a clear disconnect between international criminal law on paper and international criminal law in practice. Relevant conventions and U.N. resolutions that seem to suggest that child soldiers may be legally prosecuted by international tribunals simultaneously show a clear preference for rehabilitation and reintegration. Similarly, the statutes for ad hoc and special courts have allowed for the prosecution of children, but the prosecutorial strategies and practices of these tribunals show a clear reluctance to try them. "Despite the absence of a[n explicit] ban on the criminal prosecution of child soldiers, none have ever been prosecuted by an international court."<sup>162</sup> As the number of children serving in armed forces across the world continues to rise, this gap in international criminal law must be closed.

In order to find the appropriate balance between treating child soldiers as victims or perpetrators, we must focus on two clear themes within this fragmented body of law. First, when dealing with child soldiers, the focus must be on the best interests of the child.<sup>163</sup> This theme weaves its way throughout all of these conventions, resolutions, and statutes, finding its expression in jurisdictional limitations,<sup>164</sup> explicit due process protections for children,<sup>165</sup> limits on sentences of imprisonment,<sup>166</sup> and prohibitions on capital punishment.<sup>167</sup> The second theme is the obligation to rehabilitate child soldiers and reintegrate them into their communities, regardless of the crimes they have committed.<sup>168</sup> Given these overarching themes, a strong argument can be made for the conclusion that

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162 *Id.* at 2. Some have gone so far as to argue that this tradition of excluding children from prosecution in international tribunals in the absence of a jurisdictional ban rises to the level of a "customary norm of international law." *Id.* at 10.

163 *See, e.g.*, Convention on the Rights of the Child, *supra* note 85, art. 3.

164 *See, e.g.*, SCSL Statute, *supra* note 140, art. 1, ¶ 1, art. 7, ¶ 1 (limiting the Court's power to prosecuting "persons who bear the greatest responsibility" for violations of international and domestic law); Rome Statute, *supra* note 148, art. 26.

165 *See, e.g.*, Convention on the Rights of the Child, *supra* note 85, arts. 37, 40; Beijing Rules, *supra* note 107, ¶ 7.

166 *See, e.g.*, SCSL Statute, *supra* note 140, art. 7, ¶ 2; Convention on the Rights of the Child, *supra* note 85 arts. 37(a)–(b); Beijing Rules, *supra* note 107, ¶¶ 18.1, 19.1.

167 *See, e.g.*, Convention on the Rights of the Child, *supra* note 85, art. 37(a); Beijing Rules, *supra* note 107, ¶ 17.2; Additional Protocol I, *supra* note 73, art. 77; Additional Protocol II, *supra* note 77, art. 6, ¶ 4; Geneva Convention IV, *supra* note 71, art. 68.

168 *See, e.g.*, SCSL Statute, *supra* note 140, art. 7, ¶ 1; Optional Protocol to the CRC, *supra* note 100, art. 6, ¶¶ 1, 3, 7; Convention on the Rights of the Child, *supra* note 85, arts. 39, 40, ¶ 1; Beijing Rules, *supra* note 107, ¶ 18.1(a)–(h).

international tribunals should not prosecute children below the age of eighteen for their crimes.

#### A. *Fixing the Age of Criminal Liability at Eighteen*

In the future, international courts should follow the lead of the ICC and institute an absolute prohibition on the prosecution of children who committed crimes when they were under the age of eighteen.<sup>169</sup> Given difficulties in establishing the mental culpability of children, the importance of a child's best interests, and the realities of life as a child soldier, it is best to leave prosecution of children for crimes committed in armed conflicts to national courts and Truth and Reconciliation Commissions.

##### 1. Choosing Eighteen as the Minimum Age of Criminal Responsibility

Setting the international age of culpability at eighteen would be consistent with existing law. Although national approaches to the minimum age of criminal responsibility vary widely, this limit is consistent with the CRC, which defines a child as anyone under the age of eighteen.<sup>170</sup> This approach also aligns with the ICC, which excludes anyone who was below that age at the commission of their crimes from its jurisdiction.<sup>171</sup> Setting the minimum age of criminal responsibility at eighteen is also consistent with the shift in international law toward prohibiting the recruitment and use of children under that age in armed conflicts.<sup>172</sup>

Though setting a minimum age of criminal responsibility may seem arbitrary, it is crucial that a precise age be chosen. While some have argued that it would be best to take subjective factors such as the accused's actual maturity, personality, and capacity for understanding the consequences of his or her actions into account,<sup>173</sup> such an approach would be highly inconsistent. Objectively drawing the line at eighteen may be over- or underinclusive in terms of moral culpability, but a

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169 Though a revision of one or more of the conventions and U.N. Resolutions discussed in this Essay could also bring clarity to this issue, that may not be advisable. All of the legal instruments covered in this Essay govern the rights of children at both the international and the national level. Given the wide-ranging ages of criminal responsibility among nations, it is best to anticipate that some children will be prosecuted for domestic or international crimes at the national level and will need those protections. Providing states with guiding due process and rehabilitation principles will serve as a means of protecting children who are subject to state prosecution.

170 See Convention on the Rights of the Child, *supra* note 85, art. 1. Setting the minimum age of criminal responsibility at age eighteen is also consistent with the CRC's "underlying rehabilitative goals," as it will maximize opportunities for young offenders to access rehabilitative services. Grossman, *supra* note 10, at 347.

171 See Rome Statute, *supra* note 148, art. 26.

172 See *supra* notes 97–103 and accompanying text (describing the amendments made to the CRC by the Optional Protocol); see also *supra* notes 141–47 and accompanying text (explaining that, in practice, the SCSL did not prosecute anyone under the age of fifteen despite the opportunity created by the SCSL Statute).

173 See, e.g., Erin Lafayette, Note, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 304 (2013) ("To determine when a child has the sufficient mental capacity to . . . be held responsible for[] his actions in armed conflict, an adolescent's right to form and express his own opinions must be examined in light of his psychological development and cultural perspective.").

retrospective, case-by-case assessment of a child's maturity at the time they committed a crime would be incredibly imprecise. Setting a precise age, below which individuals cannot be prosecuted, will ensure that all children are subject to equal responsibility under the law.

Choosing the age of eighteen as the lower limit for criminal accountability also reflects the state of children's ongoing psychological and moral development prior to that age. While all individuals mature at different rates, children generally do "not have the requisite mental, physical, or moral development to make a logical decision regarding [their] participation in [a] conflict" before the age of eighteen.<sup>174</sup> Numerous studies have established that children "lack the capacity to determine their best interests, to independently form opinions or to analyze competing ideologies."<sup>175</sup> Children are also prone to "irrational, emotion-driven behavior,"<sup>176</sup> and generally lack the mental maturity "to act independently or appreciate the rights of others."<sup>177</sup> Because they lack the necessary mental and moral maturity to make informed decisions, children are "more easily coerced or influenced into committing atrocities" and more prone to acquiesce to outside pressures.<sup>178</sup>

## 2. Meeting the Mens Rea Standard

Setting the minimum age of criminal responsibility at eighteen will also alleviate difficulties related to establishing a child's moral culpability. To establish a child soldier's criminal liability, it is not enough to simply demonstrate that he or she committed a particular act. Each crime requires a union of *actus reus*—the physical act of the crime—and the requisite *mens rea*—the particular state of mind at the time of the crime. As discussed in the subsection IV(A)(1), "studies demonstrate that, up to a certain age, a child is not fully able to understand his or her acts."<sup>179</sup> As a consequence of their ongoing psychological development, many child soldiers do not have the capacity to commit particular crimes with the required intent. Although "the exact age at which an individual can commit a criminal act with the required *mens rea* element is not clearly determined," it is far easier for a court to presume that an adult acted with the requisite moral culpability than to determine the state of mind of a soldier under the age of eighteen.<sup>180</sup> The difficulty of establishing that a child acted with the requisite *mens rea* is further compounded by the reality that most child soldiers are severely abused and forced to commit crimes under duress or under the influence of desensitizing drugs or alcohol.<sup>181</sup>

International crimes have particularly onerous *mens rea* requirements and it would be difficult to demonstrate that child soldiers had the mental capacity to

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174 *Id.* at 303.

175 *See* Abbott, *supra* note 1, at 517.

176 David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 84 (2013).

177 Grossman, *supra* note 10, at 347.

178 Debarre, *supra* note 121, at 2–3.

179 Fanny Leveau, *Liability of Child Soldiers Under International Criminal Law*, 4 OSGOODE HALL REV. L. & POL'Y 36, 38 (2013).

180 *Id.*

181 *See supra* Section I.D.

commit them.<sup>182</sup> Some international crimes require a special intent in addition to the crime's traditional *mens rea* requirement. To meet the legal standard for the international crime of genocide, for example, it would have to be shown that a child acted with a specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>183</sup> On top of that, it would have to be shown that the child had the intent to commit one of the five underlying acts that constitute genocide.<sup>184</sup> Other international crimes, such as crimes against humanity, require knowledge of the existence of particular circumstances. To demonstrate that a child soldier committed a crime against humanity, it would have to be shown that the child committed the act "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>185</sup>

### 3. Safeguarding the Best Interests of Children

Excluding children from the jurisdiction of international tribunals will also safeguard their best interests. Participation in a criminal trial could be very psychologically damaging for a former child soldier. Forcing a child to recount their involvement in atrocities could threaten their psychological healing, cause them further trauma, and delay their return to any sense of normalcy.<sup>186</sup> Forcing a child soldier to stand trial would also leave them at a higher risk of stigmatization and make it more difficult for them to reintegrate into society.<sup>187</sup> If a child was formally charged as a war criminal, "any community doubt concerning [their] actions [would] be eviscerated, and it [could] be impossible to convince [their] communities to accept them."<sup>188</sup>

There are also practical reasons for excluding children from the jurisdiction of international tribunals. If children know that they could be subject to prosecution they may be more reluctant to disarm.<sup>189</sup> In addition, all international tribunals are limited in their time, funding, and resources. Given these limitations, international tribunals could not necessarily uphold the procedural safeguards for children that are required by international law. Given the number of children involved in armed conflict, some have argued that opening the door to their prosecution could overwhelm courts. However, that is unlikely to be the case. Historically, only a fraction of the individuals who are most culpable in the wake of a conflict are indicted and prosecuted by international tribunals. It is unlikely that children would be among those who are responsible for the most atrocious crimes. It is also unlikely

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182 Some have "argued that international crimes have such onerous *mens rea* requirements that children will always lack the capacity to commit them." See, e.g., Happold, *supra* note 76, at 72.

183 Rome Statute, *supra* note 148, art. 6.

184 *Id.* art. 6(a)–(e).

185 *Id.* art. 7, ¶ 1.

186 See Debarre, *supra* note 121, at 17.

187 See *id.*

188 Sara A. Ward, Note, *Criminalizing the Victim: Why the Legal Community Must Fight to Ensure That Child Soldier Victims Are Not Prosecuted as War Criminals*, 25 GEO. J. LEGAL ETHICS 821, 833 (2012).

189 Ramgoolie, *supra* note 41, at 156.



that a prosecutor would consider it necessary to put their already limited time and resources toward a child's trial.

#### 4. Leaving Determinations of Culpability to Truth and Reconciliation Commissions and Domestic Courts

Those who favor the prosecution of child soldiers have argued that their trials will provide communities with a much-needed sense of finality and give those who have suffered years of violence and fear the justice they deserve.<sup>190</sup> However, prosecuting child soldiers at the international level is not the only means of bringing about the "justice" so many people demand. In multiple instances, Truth and Reconciliation Commissions ("TRCs") have proven themselves to be an effective means of bringing communities a sense of closure in the aftermath of a conflict.<sup>191</sup> Unlike criminal trials, TRCs do not play a "punitive, prosecutorial role."<sup>192</sup> Instead, TRCs "allow[] perpetrators and victims of human rights violations to come forward and account for their actions in the spirit of promoting national peace and reconciliation."<sup>193</sup> TRCs such as the one established in Sierra Leone have been an "effective means of providing a non-judicial and non-punitive approach to accountability for child soldiers."<sup>194</sup> In addition to promoting healing within a community, TRCs also foster the child's "total rehabilitation and social reintegration in accordance with" the overriding goals of the CRC,<sup>195</sup> the Optional Protocol to the CRC,<sup>196</sup> and the Beijing Rules.<sup>197</sup>

The jurisdictional limitation proposed in this Essay also would not inhibit the ability of domestic courts to prosecute children who were under the age of eighteen at the time of the commission of their crimes. Given the highly varied conceptions of childhood among cultures and the wide-ranging minimum ages of criminal

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190 Other arguments in favor of prosecuting children have major flaws. For instance, some have argued that, in the absence of judicial accountability, the leaders of armed groups will be more likely to encourage children to commit atrocious crimes. See, e.g., Megan Nobert, *Children at War: The Criminal Responsibility of Child Soldiers*, 2011 PACE INT'L L. REV. ONLINE COMPANION 1, 1; Lafayette, *supra* note 173, at 311. The leaders of these armed groups are individuals who are willing to kidnap children and murder defenseless civilians to accomplish their agendas. Simply put, there is not much they are unwilling to do; it is probably safe to say that the remote possibility of prosecution is far from their minds in the heat of an armed conflict. The adults who recruit and utilize child soldiers view them as dispensable manpower, and it would be far more effective to subject them to prosecution for their actions than the children they employ. Others have argued that, in the absence of prosecution, "mayhem and social disorder will result." See, e.g., Joshua A. Romero, Note, *The Special Court for Sierra Leone and the Juvenile Soldier Dilemma*, 2 NW. J. INT'L HUM. RTS. 2, 11 (2004). Should that be a legitimate concern in the wake of a conflict, a nation could prosecute child soldiers at the national level (as discussed in this Section).

191 See Ward, *supra* note 188, at 835.

192 Zarifis, *supra* note 122, at 20.

193 *Id.*

194 Ward, *supra* note 188 at 835.

195 Zarifis, *supra* note 122, at 21; see also Convention on the Rights of the Child, *supra* note 85, arts. 39, 40, ¶ 1.

196 See Optional Protocol to the CRC, *supra* note 100, arts. 6, ¶ 3, 7, ¶ 1.

197 See Beijing Rules, *supra* note 107, ¶ 18.1(a)–(h); see also SCSL Statute, *supra* note 140, art. 7, ¶ 1.

responsibility across nations, domestic courts are a much more appropriate forum for such prosecutions.

Examples of prosecutions of child soldiers for war crimes, crimes against humanity, or other international crimes in national courts are extremely rare, but not nonexistent. After the Rwandan genocide, “the genocide victims’ desire for retribution in the name of justice . . . resulted in the arrest and detention of” over one thousand children.<sup>198</sup> It was the first time in history that children were imprisoned for genocide, but very few of them were ever tried for their crimes.<sup>199</sup> In 2000, the Democratic Republic of Congo executed a fourteen-year-old child soldier for his involvement in the violence that has long gripped that country.<sup>200</sup> When the Democratic Republic of Congo imposed death sentences on another four child soldiers between the ages of fourteen and sixteen the following year, a number of Nongovernmental Organizations (“NGOs”) intervened.<sup>201</sup> After much lobbying, the sentences were not carried out.<sup>202</sup> Similarly, in 2002 the Ugandan government brought treason charges against two former Lord’s Resistance Army fighters who were fourteen and sixteen years old.<sup>203</sup> Again, NGOs intervened and successfully pressured the government to withdraw the charges.<sup>204</sup>

Western countries have also tried child soldiers for the commission of international crimes. In a highly publicized case in 2010, the U.S. Military Commission tried a former child soldier for Al-Qaeda, Omar Khadr, for murder and attempted murder in violation of the laws of war.<sup>205</sup> Khadr had thrown a grenade in Afghanistan that killed an American soldier and injured two others.<sup>206</sup> When Khadr challenged his detention, the Commission determined that “neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age.”<sup>207</sup>

##### 5. Viewing Child Soldiers as Victims

Given the realities of life as a child soldier described in Part I, it is far more appropriate to view these children as the victims of violence rather than as its perpetrators. Children are more vulnerable than any other age group, and armed groups exploit characteristics inextricably linked to their childhood to turn them into vicious fighters. After they are separated from their families, child soldiers are subject to beatings, routine punishments, forced labor, and sexual exploitation. They

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198 Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 630 (1997).

199 *Cf. id.* at 629–30.

200 Happold, *supra* note 76, at 71.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 Debarre, *supra* note 121, at 8–9.

206 *Id.*

207 *Id.* at 9 (quoting EUGENE R. FIDELL ET AL., *MILITARY JUSTICE: CASES AND MATERIAL* ¶ 18 (2d ed. 2012)).

are systematically brainwashed by adults until their ethics and moral values are so distorted that they lose any sense of who they were before their involvement in the conflict. Most of their crimes are committed under the threat of injury or death, and many act under the influence of hallucinogenic drugs or alcohol. It goes without saying that children who are forcibly recruited do not exercise their consent to serve in an armed conflict, but “voluntary” recruitment is also coupled with hidden forms of coercion. More often than not, children who voluntarily join armed forces are driven to do so in order to fulfill their basic needs, and they rarely understand the gravity of what they are signing themselves up for. Setting the minimum age of criminal responsibility at eighteen will reflect these realities of life as a child soldier.

Setting the minimum age of criminal responsibility at eighteen will also ensure that, in the wake of an armed conflict, the focus is on rehabilitating and reintegrating former child soldiers rather than on prosecuting them.<sup>208</sup> Because participation in “[a]rmed conflict affects all aspects of child development—physical, mental and emotional,” effective rehabilitative services are crucial to helping former child soldiers realize that their lives do not need to be driven by violence.<sup>209</sup> Studies have shown that, without effective rehabilitative services, disarmed children are more likely to drift into a life of further violence and crime, and will often rejoin their comrades and take up arms.<sup>210</sup> Providing former child soldiers with access to an education, job training, or work programs can break this cycle and help them “disengage from the idea that violence is a legitimate means of achieving one’s aims.”<sup>211</sup> In addition, education can “normalize life” for a former child soldier, help them develop healthy peer relationships, and improve their self-esteem.<sup>212</sup> Reintegration programs can also help children reestablish contact with their families and communities. “[A]t the end of a conflict, a child’s rehabilitation is often best promoted by reuniting them with their family and community, and reintegrating the familiar local cultures and traditions into their daily life.”<sup>213</sup> Taken together, these efforts to rehabilitate and reintegrate former child soldiers will help them resume life within the community and “channel [their] energy, ideas and experience” into positive contributions to “their new, post-conflict society.”<sup>214</sup>

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208 Given the repeated emphasis in U.N. Conventions, resolutions, and court statutes on reintegrating and rehabilitating child soldiers, some have gone so far as to argue that “there is a customary international law that requires juveniles responsible for having committed war crimes to be rehabilitated and reintegrated.” *Id.* at 15.

209 Machel Report, *supra* note 16, ¶ 166.

210 Reis, *supra* note 198, at 648; *see also Sierra Leone Rebels Forcefully Recruit Child Soldiers: RUF Targets Children for Fighting, Forced Labor, and Sexual Exploitation*, HUM. RTS. WATCH (May 31, 2000), <https://www.hrw.org/news/2000/05/31/sierra-leone-rebels-forcefully-recruit-child-soldiers> (telling the stories of Sierra Leonean children who were lured back to the RUF after demobilizing).

211 Machel Report, *supra* note 16, ¶ 57.

212 *Id.* ¶ 54.

213 Lafayette, *supra* note 173, at 309.

214 Machel Report, *supra* note 16, ¶ 57.

*B. Establishing a Distinct Legal Standard for Hybrid Tribunals*

While the default should be to exclude children from prosecution in international courts, difficulties could arise in the formation of hybrid international-domestic tribunals. As the United Nation's experience negotiating the creation of the Special Court for Sierra Leone demonstrated,<sup>215</sup> some nations with minimum ages of criminal responsibility below eighteen may insist on holding child soldiers accountable for their crimes. While the aim should always be to exclude children from a hybrid tribunal's jurisdiction, there may be cases where it is necessary to hold children accountable in order to legitimize the court and its mission. In such cases, a firm legal standard distinguishing children from adults must be put in place.

Building off of the agreement reached between Sierra Leone and the United Nations, only those children who are responsible for the greatest violations of international law—namely war crimes, crimes against humanity, and genocide—should be subject to a hybrid court's jurisdiction. This limitation will exclude child soldiers who did not take an active part in hostilities from the court's jurisdiction. Since the vast majority of child soldiers are not in leadership roles and are not responsible for committing crimes on a massive scale, this limitation will also shield almost all children from criminal responsibility. In addition, the minimum age of criminal culpability should not be set lower than fifteen. Multiple provisions of international law have established fifteen as the minimum age to legally recruit and use children in armed forces, including Additional Protocol I to the Geneva Conventions<sup>216</sup> and the CRC (prior to its amendment by the Optional Protocol).<sup>217</sup> If children under the age of fifteen are considered too young to be recruited by armed groups, they must be too young to be held criminally accountable for their actions. Finally, additional safeguards should be put in place to guarantee that children accused of committing atrocities had the ability to understand the consequences of their actions and form the requisite intent. In addition to demonstrating that a child had the requisite moral culpability to commit the crimes he or she was accused of, it should be shown that the child voluntarily joined the armed forces.

In addition to the array of due process protections for children enumerated in Additional Protocol II,<sup>218</sup> the CRC,<sup>219</sup> and the Beijing Rules,<sup>220</sup> the statute for a hybrid tribunal should allow a child's age and circumstances to serve as mitigating factors and clearly list available defenses. Given the fact that many of the offenses children commit are the product of coercion or manipulation by adults, the defenses

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215 See *supra* notes 133–38 and accompanying text.

216 See Additional Protocol I, *supra* note 73, art. 77, ¶ 2.

217 See Convention on the Rights of the Child, *supra* note 85, art. 38, ¶¶ 2–3 (setting the minimum age of recruitment at fifteen); see also SCSL Statute, *supra* note 140, arts. 1, ¶ 1, 7, ¶ 1; Optional Protocol to the CRC, *supra* note 100, arts. 2, 4, ¶ 1 (suggesting increasing the minimum age of recruitment to eighteen).

218 See Additional Protocol II, *supra* note 77, art. 6.

219 See Convention on the Rights of the Child, *supra* note 85 arts. 37, 40.

220 See Beijing Rules, *supra* note 107, ¶ 7.

of duress,<sup>221</sup> intoxication,<sup>222</sup> and superior orders<sup>223</sup> will be particularly applicable in hybrid tribunals. Finally, the sanctions a child soldier can be subjected to must be limited. Imprisonment should be a last resort, and the death penalty and life imprisonment without possibility of parole should be expressly forbidden.<sup>224</sup> Consistent with the body of international criminal law explored in this Essay, the focus should be on rehabilitating child soldiers and reintegrating them into their communities.

### CONCLUSION

The difficulty of balancing cries for justice with the best interests of children has resulted in a clear gap in international criminal law. Although the relevant international conventions, U.N. resolutions, and court and tribunal statutes seem to lead to the conclusion that child soldiers may be held accountable for their crimes, the question of prosecution is far from clear-cut. As the number of child soldiers across the world continues to rise, there must be a coherent response to this issue that is consistent with existing standards of international law.

Moving forward, the best interests of the child standard instructs us that victimhood must win out over prosecution. Continued emphasis must be placed on prosecuting the adult commanders who are responsible for recruiting and using children in armed conflicts, and future international courts and tribunals should exclude all children who were under the age of eighteen at the time of their alleged crimes from their jurisdiction. Rather than forcing children to stand trial, the focus must be on rehabilitating former child soldiers and promoting the reintegration of children into their communities. “Children are humanity’s most valuable investment in the future,”<sup>225</sup> and closing this gap in international criminal law will afford them the protection they need and deserve.

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221 See generally JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 135–55 (4th ed. 2013). Imposing these extensive limitations on the prosecution of children is particularly important because the duress defense does not extend to war crimes.

222 See generally SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 1004–14 (10th ed. 2017).

223 See generally PAUST ET AL., *supra* note 221, at 122–27, 132–34.

224 See Convention on the Rights of the Child, *supra* note 85, art. 37(a); Beijing Rules, *supra* note 107, ¶¶ 17.2, 17.3; Additional Protocol II, *supra* note 77, art. 6; Geneva Convention IV, *supra* note 71, art. 68. The conclusion that child soldiers subject to prosecution should not be sentenced to death or life imprisonment is also supported by U.S. caselaw. In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court held that the application of the death penalty to an individual who was under the age of eighteen at the time of the offense violated the Eighth Amendment’s prohibition on the infliction of cruel and unusual punishment. Five years later, the U.S. Supreme Court held that imposing a sentence of life imprisonment without the possibility of parole on juveniles for nonhomicide crimes also infringed the Eighth Amendment. See generally *Graham v. Florida*, 560 U.S. 48 (2010).

225 Tiefenbrun, *supra* note 3, at 426.